

## A-Z Guide

# TRIAL AND PROBATIONARY PERIOD



## Contents

Use This Guide to Understand	2
Differences Between Trial & Probationary Periods	2
Trial Periods	3
Trial Period Management	4
Trial Periods – Questions and Answers	6
Draft Trial Period Clause	7
Probationary Periods	7
Following On From Trial & Probationary Periods	9



# Use This Guide to Understand

- What a trial period is and what rights it provides to you
- What conditions you must meet before you can successfully apply a trial period
- What a probationary period is and what rights it provides to you
- The benefits of using a trial or probationary period

## Differences Between Trial & Probationary Periods

You and an employee may agree that an employment agreement will include a trial and/or probationary period. The Employment Relations Act 2000 allows the use of such periods as long as its inclusion in an employment agreement has been agreed to by a prospective employee who has been given a reasonable opportunity to seek independent advice on that agreement.

**Warning:** Probationary and Trial periods work very differently and so you need to understand the differences between Trial Periods and Probationary Periods. Trial periods and probationary periods are quite separate from each other and each has its own legal meaning. It is important not to confuse the two, or inter-change the terminology.

### Trial periods

You and an employee can agree to put into an employee's employment agreement a trial period not exceeding 90 days. During this period, you have the right to terminate the employee within that time without the employee being able to raise a personal grievance for unjustified dismissal.

A trial period can only be agreed with an employee who has not been previously employed by the employer and it must be expressed in writing in the employment agreement.

If an employer decides to include a trial period in the employment agreement, it is strongly recommended that the employer refers to the fact that the employment agreement contains a trial period in the employee's offer letter as well.

From 23 December 2023, all employers are able to include trial period provisions in their employment agreements, regardless of size.

### Probationary periods

A probationary period can also be agreed to be placed in an employee's employment agreement. However, if you decide to terminate an employee's employment in reliance of a probationary period, the employee can still raise a personal grievance for unjustified dismissal. So, you must still follow a fair process when terminating an employee under a probationary period.

Probationary periods must be expressed in writing in the employment agreement.



# Trial Periods

## Definition

A trial period is a provision agreed with the employee and written into an employment agreement that states that:

- For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- During that period the employer may dismiss the employee; and
- The employee is not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal.

By definition a trial period cannot be longer than 90 days. If you enter into a trial period for longer than 90 days, you will not be protected from an unjustified dismissal claim even if you terminate employment in the first 90 days. Trial periods cannot be extended, even with agreement.

## Trial periods must be agreed

Trial periods must be agreed as a term in an employment agreement. All employment agreements must be mutually agreed and there are obligations to negotiate terms and conditions in good faith. This means the use of a trial period is subject to good faith negotiations. You must give the employee the opportunity to seek advice on the entire employment agreement, including the trial period clause.

The Employment Court has ruled that a trial period in the required format must commence on the first day of employment. This ruling means the employment agreement must be signed before the employee starts work on the first day of their employment.



## What 'grievance-free' means

An employee who is dismissed under a trial period cannot claim a personal grievance on the basis of unjustified dismissal. An employee can however make a claim for:

- Unjustified disadvantage
- Discrimination
- Sexual harassment
- Duress relating to membership or non-membership of a union
- Non-compliance with legislative entitlements such as Holidays Act, minimum wage, health and safety, etc.
- Breach of Human Rights Act
- Breach of good faith
- Breach of employment agreement

An employee who is dismissed during a trial period may still seek the assistance of the Ministry of Business, Innovation and Employment (formerly the Department of Labour) Mediation Service.

## Employers must comply with own policies

If you have policies or provisions elsewhere in the employment agreement, those must be followed. Often an employer will have a policy or other employment agreement provision about the steps taken to deal with a performance issue. It may also talk about training, coaching and other assistance. The relationship between those provisions and the trial period must be crystal clear as you are obliged to follow your own policies and employment agreements.

## Notice periods during trial period

You are protected from an unjustified dismissal claim if the notice to terminate is given before the end of the trial period. This means the employee can still work after the 90 days, in order to work out their notice period, as long as they have already been given notice of their termination.

The notice period in relation to a trial period must be clear. It is possible to have two notice periods. You may have a shorter notice period relating to notice under the trial period and a different (maybe longer) notice period for when the trial is over. It is recommended the notice period applying to the trial be included in the trial period clause itself.

Termination under a trial period must be managed correctly. You are required to "give the employee notice" of termination before the end of the agreed trial period. This means that termination does not take effect until the end of the agreed notice period. If provided for in the employment agreement, you may require the employee to not work during the notice period.



## Trial periods and collective employment agreements

A 90-day trial period can be included in a collective agreement in the same way any other term can be included, through negotiation and agreement between the union and the employer.

### **New Employee who is a union member:**

If a trial period is not included in a collective, and the new employee is a member of the union, then you and the employee are able to agree to additional terms and conditions on an individual basis, provided those individual terms and conditions are not inconsistent with the collective employment agreement and are in writing.

Important issues when considering whether or not a trial period is inconsistent is whether the collective employment agreement provides:

- A specific prohibition on trial periods
- Another form of trial or probation period
- A process or other details in relation to dealing with performance or misconduct issue
- A specific list of the types of employment that can be offered under the collective agreement (another type of employment may be considered inconsistent).

### **New Employee who is not a union member:**

In the case where a collective agreement does not include a trial period and a new employee, who is not a union member but whose role is covered by the collective and hence subject to the 30-day rule, a trial period clause should not be included in their employment agreement whether at day 1 or day 30 of their employment (regardless of whether they join the union or not).

This is because the Act prescribes that an employer and employee cannot mutually agree to terms and conditions that are any less favourable to the terms and conditions of the collective agreement. In almost all cases introducing a trial period provision will be less favourable.

# Trial Period Management

## Pre-employment checklist

### **Recruitment**

- From 23 December 2023, all employers (regardless of size) may use a trial period provision in the employment agreement.
- An employee and employer can agree to a trial period not exceeding 90 calendar days.
- A trial period can only be agreed with an employee who has not been previously employed by the employer.
- The trial period provision must be included in the employment agreement and the employee must sign the agreement before they commence work.
- The employee has to be given an opportunity to get advice and EMA recommends you verbally raise the trial period with the employee and refer to it in any written offer of employment.
- If the employee queries the inclusion of the trial period in the employment agreement, in good faith you cannot be dismissive or down-play the impact of it in order to secure agreement. It is a serious provision that would have serious impacts on the employee if used.



## Trial and Probation Period

- A written trial period provision including all the required aspects must be provided to the employee before they accept the employment offer.
- It is recommended the employment agreement containing a valid trial period clause be provided at the time of the job offer with acceptance being subject to a signed agreement being returned before the employee commences work.

### Employment Agreement

- As a minimum, a valid trial period provision in the employment agreement must state that:
- For a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- During that period the employer may dismiss the employee; and
- The employee is not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal. The agreement must be signed before the day the employee commences work.

EMA recommends that the trial period clause states that the trial period commences on the day the employee starts work. The trial period clause may include wording making it clear that no specific policies or procedures in relation to performance or misconduct have to be followed during the trial period. If this is not explicitly stated, you may be required to undertake procedures that you have agreed to in their employment agreements or policy manuals. Notice requirements during the trial period may be different to any notice provisions outside of the trial period.

### Checklist

1. Does the clause cover the requirements of section 67A (2) of the Employment Relations Act 2000?
  - a. The trial is for a specified period (not exceeding 90 calendar days)
  - b. That the trial comes into effect when employment commences
  - c. That during the trial, the employee can be dismissed
  - d. That, if dismissed, the employee cannot raise a personal grievance in respect of that dismissal.
2. Was the employee previously employed?
3. Did the employee sign the employment agreement before they commenced work?
4. Did the employee have the opportunity to get independent advice?

## Management during a trial period

### Good faith in the Employment Relations Act

The Employment Relations Act 2000 specifically clarifies that the good faith obligation to discuss a pending decision that may have an adverse effect on an employee's continuing employment does not apply to a decision to terminate an employee on a trial period.

Under section 4(1A)(b) of the Employment Relations Act 2000 parties to the employment relationship are required to be active and constructive in maintaining a productive employment relationship. This includes the requirement to be responsive and communicative throughout the employment relationship.

The duty of good faith applies to an employee whose employment is subject to a trial period. If you do not comply with the duty of good faith, you may be at risk of a claim for breach of good faith or personal grievance for unjustified disadvantage.

### What the Good Faith duty requires during a trial period

Termination under the trial period should not come as a "bolt out of the blue" for the employee. You should regularly meet with an employee during the trial period and continue to communicate with them.



## Trial and Probation Period

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If an employee is not performing to the required standard, an employee should be advised of this. The employee should be reminded that they are under a trial period. They should also be given time to improve before you consider termination. If performance does not improve and you wish to terminate you should meet with the employee to advise them. If you dismiss under the trial period you must give notice so check the employee's employment agreement to determine the amount of notice that is required.



## Trial and Probation Period

Good faith includes advising the employee why their employment was terminated, although there is no requirement to do so in writing. The reasons for termination should not come as a surprise to the employee as any performance concerns that you had with the employee should have been discussed during the trial period.

If the trial period is successful, you should meet with the employee and discuss their on-going employment and any further expectations.

# Trial Periods – Questions and Answers

## Is an employee able to take any legal proceedings against an employer if dismissed under a trial period?

While employees are unable to bring a personal grievance for unjustified dismissal, they can raise a personal grievance on other grounds such as an unjustified action causing disadvantage.

## Do I have to provide an employee with an opportunity to have a support person or representative present for a meeting which could result in the employee being dismissed under the trial period?

The issue is untested and there is a possibility not doing so may open up a disadvantage claim. We think it is unlikely a disadvantage claim would succeed because the employee was not given an opportunity to get representation.

## Can I rely on the trial period when dismissing an employee for serious misconduct?

If you dismiss an employee for serious misconduct during a trial period, the employee will not be able to bring a personal grievance in respect of the dismissal. However, you will need to give notice as provided in the employment agreement. In cases of serious misconduct, employers may wish to seek EMA advice.

## Do I need to provide training and support to an employee during a trial period?

Trial period employees should be treated the same as any other employees in this respect.

## Do I have to give an explanation or reason as to why an employee is being dismissed under the trial period?

There is no requirement to provide reasons in writing but as part of good faith requirements, employers should advise the reasons verbally. Please see page 8 'Management during a trial period' for more on this.

## What happens if the trial period is found to be defective?

If an employee is dismissed under a trial period which does not meet all the requirements, the employee will be able to bring a personal grievance in respect of the dismissal. This means that the employer's process and reason for dismissal can then be challenged.

## Can I employ former contractors or employees of a related company under a trial period?

Technically you may use the trial period, as long as it is absolutely clear that the person was not previously employed by you. We recommend employers use the trial periods for employees they are unfamiliar with.



**Does the 90 day period include time the employee has been on leave?**

Yes the trial period is for 90 calendar days whether or not the employee is present at work or not during that time.

**Can I include a trial period in a fixed term employment agreement?**

There is nothing in law to prevent a trial period in a fixed term employment agreement.

**Am I able to have a potential employee work for a short period of time to assess their skills before offering an employment agreement including a trial period?**

Under normal circumstances it is accepted that an employer can have such an arrangement without the person becoming an employee. However it is unclear whether the Courts would consider that a person had been previously employed for the purposes of a trial period. EMA suggests you do a thorough assessment during the recruitment process, and if you wish to further assess the person offer them a role with a trial period. This is the type of situation the trial period law is designed for. If in doubt employers should seek EMA advice.

**Do I have to give an employee a permanent employment agreement at the end of a successful trial period?**

No, a trial period agreement clause is a term of the wider agreement for the first period of employment. After the trial, all other terms continue to apply unless the employee is dismissed under the trial period.

**Can I extend a trial period?**

Trial periods cannot be extended past the 90 days. You are also unable to agree to a 30-day trial period and later extend that trial period to 90 days. By definition, a trial period must start on the first day of employment.

**Can I include a probationary period and a trial period in the same employment agreement?**

No. MBIE have taken the view that a probationary period cannot be applied after a trial period. While the Courts have left it open as a technical possibility, our recommendation is not to have both probation and trial periods together in an employment agreement.

**Can I include a trial period for a new employee whose role is covered by a collective agreement for the first 30 days of employment?**

No. While the Act allows you and the employee to mutually agree on additional terms and conditions of employment, the additional terms and conditions cannot be any less favourable than the terms and conditions of the collective agreement that covers their role. In almost all cases introducing a trial period provision will be less favourable.

**Can a candidate on a work visa be employed on a trial period?**

If you are employing a candidate under the Accredited Employer Work Visa Scheme you cannot do so using a trial period provision. From 29 October 2023, accredited employers have been prevented from using trial periods in their employment agreements and will be checked when employers submit Job Check applications. Doing so carries the risk for employers of losing their accreditation. For all other work visa types, we recommend you check any New Zealand Immigration requirements.



# Draft Trial Period Clause

## 1. Trial Period

1.1 The Employee and Employer agree that the Employee's employment is subject to a trial period of 90 days duration and the trial period will commence on the day the Employee starts work.

1.2 During the trial period the Employer may dismiss the Employee or give notice of dismissal; and, if the Employer does so, the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

1.3 Notwithstanding any other provision of this agreement, during the trial period either party may terminate this agreement by giving one week's notice of termination to the other party. The Employer may pay the Employee wages or salary instead of the Employee being required to work during the notice period.

1.4 The parties expressly agree that, during the trial period, the Employer is not required to follow any particular process relating to managing the Employee's performance, conduct, training or any other matter relating to the Employee's employment, whether set out in this employment agreement, in any Employer policies, or in any other document.

### Notes to employer (not to be included in clause):

- a. The basic clause above sets out the minimum requirements for a trial provision as set out by the Employment Relations Act 2000.
- b. The prospective employee must be advised they are entitled to seek independent advice about the intended agreement and be given a reasonable opportunity to seek that advice.
- c. The employment agreement must be signed before the employee commences work.
- d. A trial period may only be included where the employee has not previously been employed by the employer.
- e. The trial period clause is intended to deal with a number of other issues which may arise in respect of termination in reliance on a trial period. However, note that a number of issues relating to the use of trial periods have not been tested in the Courts.
- f. The clause is intended to contractually deal with issues relating to payment in lieu of notice and to expressly exclude the application of policies setting out process requirements.
- g. The requirements relating to trial periods require that notice of termination must be given to the employee. As per 1.3 above, once notice has been provided, the employer may exercise its right under the clause to pay wages instead of the employee being required to work the notice period. Under the sample clause employment would terminate at the end of the notice period. The employee may also be entitled to any other benefits applicable under the agreement, for example use of a company vehicle, even though they are not required to work.
- h. Note that the duty of good faith still applies, and there is also a requirement not to treat employees on trial periods differently from those employees who are not on trial periods.
- i. If the employment agreement contains a trial period clause it is recommended that you refer to the fact in the offer of employment letter.
- j. If you are engaging an employee on a work visa, please check the New Zealand Immigration requirements and any restrictions.
- k. If you are uncertain about any aspect of the application of this clause to your specific situation you should seek specific legal advice.

## Probationary Periods



## Trial and Probation Period

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Trial periods and probationary periods are quite separate from each other and each has their own legal meaning. It is important not to confuse the two, or inter-change the terminology.

Like a trial period, a probationary period must be specified in writing in the employment agreement. However, an employee who is dismissed under a probationary period can still raise a personal grievance for unjustified dismissal.

### Example of Probationary Period clause

01. The first **[number]** weeks of employment will be a probationary period during which your competency, behaviour and conduct will be appraised and monitored. The probationary period will commence on the day you start work.
02. The Employer may, at its sole discretion, extend the probationary period for a further set period(s) to provide further opportunity to address shortcomings and/or to meet the standards required.
03. If warranted during the period(s), notwithstanding the employer's house rules/disciplinary procedures, you will be given one written warning. Failure to remedy the issues raised in the warning or the occurrence of other competency, behaviour or conduct shortcomings may result in dismissal with **[number]** weeks' notice (or payment in lieu thereof) during or at the end of the probationary period.
04. Nothing in this clause shall prevent your summary dismissal for serious misconduct.
05. During the probationary period you may terminate this agreement by giving **[number]** weeks' notice.

Refer to the **A-Z Guides on Individual Employment Agreements** for more information.



## Obligations under probationary periods

The mere existence of a probationary period will not defeat any terms and conditions of employment relating to notice and termination in an employment agreement; if lesser terms and conditions of employment are to apply to probationary periods, then they must be expressed as part of the probationary arrangement.

It is possible to apply condensed disciplinary processes to probationary periods; if an employee would normally be subject to a 3-warning disciplinary process for repeated misconduct, the employee on probation may be subject to a shorter disciplinary process such as a 1-warning disciplinary process. However, the employee on probation must be given the opportunity to correct their behaviour or performance, and he or she must know before they are dismissed that the employment was in jeopardy.

An employee on a probationary period should be put on notice that their performance will be closely assessed and their employment will only be assured if the employer's standards are met. The employer must, in good faith, point out the performance issues that have arisen, how they can be remedied and what the consequences will be if they are not remedied.

The objective of a probationary period is always for it to be successful and both parties must contribute to its success. If it becomes clear to you that the employee is not achieving the required standard, the employee must be given fair warning before the end of the probationary period that the employee's employment will be coming to an end.

This extract, which sets out the principles that are applied in cases involving poor performance that are usually applicable in the context of probationary periods, is a key case and often cited and is from the Employment Court decision in *Trotter v Telecom Corp of NZ Ltd* 1993 2 ERNZ 659:

1. *1 Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
2. *2 If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*
3. *3 Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*
4. *4 Was a reasonable time allowed for the attainment of those standards?*
5. *5 Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*
  - a. *Using an objective assessment of measurable targets;*
  - b. *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*
  - c. *Listening to the employee's explanation with an open mind;*
  - d. *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
  - e. *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment?*



## Application of a probationary period

The duration of a probationary period should reflect the period of time in which a new employee can be reasonably expected to come to terms with the performance of the position for which they applied. That period may take into account any time that may be required for training and instruction and the subsequent demonstration of basic proficiencies. Most probationary periods do not go for longer than 6 months.

Every new position will need to be assessed individually to determine the appropriate duration of any probationary period that may be applied to it. At the outset of the period you and your employee who is to begin on a probationary period should discuss how the period is going to work, and what the expectations are and when they will be reviewed. The employee should know who is responsible for any training or instruction they are to receive and whom to approach if they experience any difficulties.

If the employee's performance is less than satisfactory the employee should be informed of that within an appropriate timeframe; it should be reiterated at that time what the standard expected is, suggestions made that might assist the employee in achieving the expected standard, and encouragement offered by way of further assistance if needed.

It is important to keep in mind the object of a probationary period, which is that it will be a success and that by working together that object should be obtainable.

If, after a reasonable opportunity to do so, the new employee's performance is not improved and there are genuine concerns about the employee's suitability for the position then it may be appropriate to consider managing their performance with the disciplinary process. This process should be outlined in either the terms of the probationary period or where it is outlined for all your other employees (either in the employment agreements or a policies and procedures handbook).

Depending on the duration of the probationary period, and whether it is extendable or not, the employee whose performance remains unsatisfactory despite intervention may have progressed down the disciplinary process to dismissal on notice by the time the period is exhausted.

If a new employee's performance is satisfactory or better throughout a probationary period then the pre-set review times should be utilised to reinforce that performance and, if appropriate, set further objectives. By doing that, your new employee will feel encouraged and recognised in their role and is more likely to continue to respond favourably to instruction and responsibility.

Refer to the **A-Z Guide on Discipline** for more information on warnings and dismissal on notice.



## Additional Issues

The existence of a probationary period does not give an employer a right to dismiss an employee at its conclusion and on reliance of that period if the employee has not been accorded adequate training and instruction and a reasonable opportunity to respond to those, in the understanding that if their performance did not improve, they would be dismissed.

The probationary period should be a time agreed by the parties to the employment relationship when the employee will be given training and instruction and feedback on a regular basis about their performance in relation to the employer's expectations.

A probationary period should be a positive and constructive experience for both the employer and employee and should be a mechanism for creating a framework for future performance management.

You may have both a trial period and a probationary period. However, you are unable to have both a trial and probationary period applying at the same time as it may cause confusion as to whether an employee can take a person grievance inside 90 days through the probationary period. It would be better to have the probationary period commencing immediately after the trial period finishes.

## Following On From Trial & Probationary Periods

At the conclusion of a successful trial or probationary period you should meet with your new employee to discuss their performance overall and set objectives for the future. This meeting will be the first of the appraisals you will undertake with that employee on a regular basis throughout the employment relationship.

At this time, it may be appropriate to reinforce certain policies and procedures, and, stipulate the terms and conditions of employment that apply to the relationship now, that may not have applied while the trial or probationary period ran its course.

It is a useful opportunity for you to assess the trial or probationary period itself and evaluate how it might be improved upon. Your new employee may have some valuable comments to contribute on this point.



## Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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